



Paper No. 20

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OFFICE OF PETITIONS

ON PETITION

In re Application of
Napoli et al.
Application No. 09/012,144
Filed: January 22, 1998
Attorney Docket No. 77140DMW

This is a decision on the petition under 37 CFR 1.137(a), filed on August 6, 2001, to revive the above-identified application.¹ The petition asserts timely mailing of a proper reply to the last Office action and is being treated as a petition under 37 CFR 1.181 to withdraw the holding of abandonment for this application.

The petition is **GRANTED**.

A Notice of Appeal was filed on September 11, 2000 (Certificate of Mailing date September 1, 2000) in response to the March 1, 2000 final Office Action.² Under 37 CFR 1.192(a), an appeal brief was due on November 14, 2000 (Tuesday).³ No appeal brief was filed on or before November 14, 2000 and no extension of time under 37 CFR 1.136(a) was obtained. Consequently, the appeal was dismissed. Since no claims were allowed in the March 1, 2000 final Office Action, this application became abandoned as of November 12, 2000.⁴ A Notice of Abandonment was mailed on June 18, 2001.

¹ A 1/25/02 "Request for Status of Petition to Revive Abandoned Application" brought to the attention of the Office that a petition to revive had been filed on 8/6/01 via U.S. Postal Service "Express Mail Post Office to Addressee" service under mailing label number ET 042051860US.

² The Notice of Appeal was filed along with a request for a 3-month extension of time. As indicated in the 9/19/00 Advisory Action letter, an "After Final Amendment & Request for Reconsideration" filed concurrently with the Notice of Appeal was not entered by the Examiner because it raises new issues.

³ The 2-month period for filing the appeal brief starts from 9/11/00, the PTO receipt date of the Notice of Appeal, and ends on 11/11/00, a Saturday and Veteran's Day, a Federal holiday which was observed on 11/13/00, the following Monday. An appeal brief filed on 11/14/00, the first business day after 11/13/00, would have been considered "timely." See MPEP sections 1206 and 710.01(a) (Aug. 2001).

⁴ See 37 CFR 1.192 (b) (On failure to file the brief, accompanied by the requisite fee, within the time allowed, the appeal shall stand dismissed.) and MPEP section 1215.04 (Aug. 2001) (If no brief is filed within the time prescribed by 37 CFR 1.192, the appeal stands dismissed by operation of the rule. If no claims stand allowed, the application is considered as abandoned on the date the brief was due.). Even though under 37 CFR 1.7(a), an appeal brief filed on or before 11/14/00 (Tuesday) would have been considered "timely," failure to file an appeal brief on or before 11/14/00 renders the appeal dismissed and the application abandoned as of 11/12/00.

The August 6, 2001 petition asserts that an appeal brief was mailed on March 1, 2001 along with a Certificate of Mailing and a request for a 4-month extension of time to file the appeal brief,⁵ thus implying that the application should not be held abandoned. In support, the petition encloses a copy of the allegedly mailed appeal brief and a transmittal letter both bearing a "03/01/01" Certificate of Mailing.

Correspondence required to be filed in the PTO within a set period of time will be considered as being timely filed if it is deposited as first class mail with the U.S. Postal Service in accordance with the procedure set forth in 37 CFR 1.8(a). In the instant case, however, the allegedly mailed appeal brief is not in the file for this application. In order to have this appeal brief considered timely filed as alleged, i.e., filed on the Certificate of Mailing date of March 1, 2001, 37 CFR 1.8(b) requires counsel for Applicants to:

- (1) inform the PTO of such mailing promptly after becoming aware of the PTO's non-receipt of the mailed appeal brief;⁶
- (2) supply an additional copy of the previously mailed appeal brief;⁷ and
- (3) provide a statement attesting on a personal knowledge basis . . . to the previous timely mailing of the appeal brief.⁸

The August 6, 2001 petition meets the above requirements under 37 CFR 1.8(b).⁹ The Office thus concludes that an appeal brief was timely filed on March 1, 2001, and that the appeal was not dismissed by operation of the rule. Therefore, the application was not abandoned and the holding of abandonment for this application is hereby withdrawn. The Office sincerely apologizes for any inconvenience caused by the delay.

⁵ A 4-month extension of time would have extended the due date for the appeal brief to 3/1/01, and would render an appeal brief mailed on 3/1/01 with a proper certificate of mailing "timely" filed.

⁶ This condition is considered to have been met, in that, the 8/6/01 petition was filed less than 2 months after the 6/18/01 Notice of Abandonment, and there is no evidence of counsel's prior knowledge of PTO's non-receipt of the appeal brief.

⁷ In addition to the copy of the 3/1/01 Appeal Brief enclosed with the 8/6/01 petition, counsel submitted 3 additional copies on April 2, 2002 (37 CFR 1.192(a) requires an appeal brief to be filed in triplicate).

⁸ The 3/1/01 Certificate of Mailing bears the signature of Marc A. Rossi, who is also the registered practitioner who attests to the 3/1/01 mailing in the 8/6/01 petition.

⁹ See supra notes 6-8.

No petition fee is owed.¹⁰ As authorized in the March 1, 2001 Appeal Brief Transmittal, Deposit Account No. 18-2056 has been charged the appeal brief filing fee of \$310, and \$1,390 for a 4-month extension of time to file the appeal brief.¹¹

Finally, the practitioner signing the August 6, 2001 petition does not appear to have a power of attorney to prosecute this application, and uses a correspondence address which is different from that in the Official record for this application. If this practitioner desires to receive future correspondence regarding this application, an appropriate power of attorney as well as a change of correspondence address must be submitted. While a courtesy copy of this decision is being mailed to this practitioner, all future correspondence will be directed to the address currently of record unless and until such time as appropriate instructions are received to the contrary.¹²

The application is being forwarded to Technology Center 2700 for review of the appeal brief submitted with the August 6, 2001 petition.

Telephone inquiries concerning this decision may be directed to Petitions Attorney RC Tang at (703) 308-0763.



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¹⁰ A petition to withdraw the holding of abandonment does not require a fee. See MPEP 711.03(c)(I) (Aug. 2001).

¹¹ Both are fees in effect on 3/1/01 when the appeal brief was filed.

¹² Note, however, MPEP section 403.02 (Aug. 2001): "if . . . a second attorney is . . . appointed without revocation of the power of the first attorney, . . . the Office letters are to be sent to [the second attorney]." If the current correspondence address is to be retained while an outside counsel prosecutes the application, Applicants/Assignee may so indicate in the new power of attorney should one be filed later.